No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN SEED TRADE ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Seed Trade Association ("ASTA") is a voluntary, nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties. ASTA members annually invest millions of dollars in the research and development of new seed varieties to make American agriculture more productive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the

United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. As representative of the entire seed industry, ASTA is in a unique position to bring to the attention of the Court information on the impact of the Plant Variety Protection Act on that industry, and in particular the deleterious impact industry-wide of the sort of brown bagging abuses permitted by the lower court's erroneous interpretation of the Act.

The Court of Appeals for the Federal Circuit granted ASTA's motion for leave to participate as amicus curiae below, and ASTA filed a brief amicus curiae supporting petitioner Asgrow Seed Company. ASTA's brief was cited by Circuit Judge Newman in her dissent from denial of rehearing in banc. Pet. App. 32a n.2. *See also id.* at 31a (discussing views of amici curiae). Counsel for respondents has nonetheless declined to consent to the filing of this brief. Counsel for petitioner has consented.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN SEED TRADE ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Seed Trade Association ("ASTA") is a voluntary, nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties. ASTA members annually invest millions of dollars in the research and development of new seed varieties to make American agriculture more pro-

ductive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. ASTA participated as amicus curiae in this case before the Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case, and ASTA will not repeat them here. We note, however, that the facts fit a familiar pattern, increasingly repeated not only in connection with protected soybean varieties but with respect to wheat, cottonseed, and a wide range of other sexually reproduced plants that form the basis of American agriculture. The activity of the Winterboers that led to the present litigation—purchase of seed protected under the Plant Variety Protection Act, growth of a crop with that seed producing many multiples of the original seed purchase, and then sale to other farmers of all or most of the crop as seed in direct competition with the owner of the seed variety, rather than as grain or feed in the market—has become a persistent problem threatening the entire seed industry.

This phenomenon has been confirmed not only by the extensive litigation that has arisen in response to such "brown bagging" abuses,[1] but by the Economic Research

[1] For example, petitioner Asgrow filed at least 18 suits in 1988-1991 to enforce its PVPA certificates for soybeans. *See* Joint Appendix 30-31, *Asgrow Seed Company* v. *Winterboer*, 982 F.2d 486 (Fed. Cir. 1992). Delta and Pine Land Company was involved in three suits in 1992 alone in response to brown bagging abuses undermining its rights to cottonseed varieties. *See* Brief for Amicus Curiae Delta and Pine Land Company Urging Affirmance of the Judgment 18, *Asgrow Seed Company* v. *Winterboer*, *supra*.

Service of the Department of Agriculture. A recent report by that office confirmed that "significant portions of wheat and soybean varieties have been grown from bin run seed"—*i.e.*, brown bag seed, or seed that was not purchased from the owner of the variety supposedly "protected" under the Plant Variety Protection Act. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, Agricultural Economic Report No. 654, at 1 (Nov. 1991).

The broader significance of the fact pattern in this case is also confirmed by the extensive participation of amici curiae in the court below. As Judge Newman noted, twelve briefs amici curiae were filed below, "apparently representing the entire seed industry." Pet. App. 31a. *See* Pet. 7 n.5. Not only ASTA, but a wide variety of individual companies holding certificates under the PVPA came forward to explain the adverse impact of brown bagging abuses on their particular research and development programs. *See infra*, pp. 9-14.

In short, the facts of this case are hardly unique. They are part of a pattern replicated throughout the country and across the full range of sexually reproduced crops. This litigation is accordingly of concern far beyond Asgrow Seed Company and the Winterboers.

SUMMARY OF ARGUMENT

I. The continued well-being and international competitiveness of American agriculture depends in large measure on the development of new seed varieties that produce greater yields and are more resistant to adverse environmental conditions, disease, and agricultural pests. Prior to 1970, the bulk of research and development in the area of sexually reproduced crops—such as soybeans, wheat, and cotton—was conducted by university experiment stations and government entities. Extensive private commercial investment in new sexually reproduced plant

varieties was not feasible, because farmers could grow and sell many multiples of the new seed variety after the initial purchase, precluding recovery by the private investor of its significant research and development costs.

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, was designed to and did change that. Prompted by the success of similar legislation in England, the Act afforded patent-like protection to new seed varieties, providing the private sector an opportunity to recoup the costs of developing the new varieties. The Act was a great success, giving birth to a new era for the American seed industry. Private funds poured into the development of new seed varieties. Not all of the new varieties were commercially successful, and when one was not, the investor lost money. But there was a dramatic increase in the number of commercially available new varieties offering greater yields and crops more resistant to disease and pestilence. And the protection afforded by the Plant Variety Protection Act offered an incentive to persist in the financially risky endeavor of trying to develop new and better varieties. University extension services and government funding were able to be redirected to more basic research, while the private sector took up the task of developing progressively better seed varieties for the commercial market.

II. With the success of the Act and the boom in the private seed breeding industry, however, a significant abuse of the Act developed. Farmers began selling all or portions of a crop derived from a seed variety protected under the Plant Variety Protection Act for use as seed, cutting into the supposedly protected market of the breeder. The farmer incurred none of the extensive research and development costs of the seed trade company, and accordingly could underprice the company by a wide margin. *See* Pet. 4 n.2. This practice—known as "brown bagging"—undermined the entire structure of the Act, for it removed the critical financial incentive for private sector investment in the first place.

The national consequences of removing the financial incentive are increasingly evident throughout the seed industry. Companies that had established new research programs and invested millions of dollars after passage of the Plant Variety Protection Act found that, time after time, the promised financial rewards failed to materialize due to brown bagging. This was not because the new seed varieties they developed were unsuccessful—the varieties became predominant in terms of the number of acres planted. The problem was that only a small portion of the seed necessary to plant those acres was purchased from the "protected" certificate holder under the Plant Variety Protection Act. The rest came from brown bagging. With the promised protection of the Act being eaten away by brown bagging abuses, company after company—Anderson Clayton, Cargill, Agrigenetics, Agripro, Jacob Hartz, Northrup King, Pioneer Hi-Bred, Delta and Pine, Golden Harvest, Stoneville Pedigreed, DeKalb, and others—was forced to abandon seed development programs and shut down research facilities.

III. The decision below, by construing the statute to permit farmers to sell as seed up to 50 percent of a crop grown from a protected variety, legitimizes much of the brown bagging that has already occurred and will certainly encourage even more. The end result will plainly be, as Judge Newman pointed out, to "nullif[y] the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a (dissenting from denial of rehearing in banc). Although the immediate impact will be on the seed industry, the long-term consequences will be borne by farmers themselves, who will have fewer and less beneficial seed varieties to choose from, and by consumers, who will no longer enjoy the benefits of agricultural innovation.

As explained in the petition for certiorari, nothing in the language of the statute requires such a result. Indeed, the language instead compels an interpretation limiting

the amount of protected seed a farmer may sell to the amount saved to grow another crop. Such a construction effectively prevents farmers from going into competition with the owners of seed varieties, while allowing a farmer to engage in the traditional practice of saving enough seed for next year's crop or selling such saved seed to a neighbor if his own planting plans change. Such a construction also serves the underlying purpose of the Plant Variety Protection Act by ensuring that the incentive to develop new and better varieties is not eviscerated by an exception swallowing the rule.

ARGUMENT

I. THE PVPA GAVE BIRTH TO A NEW ERA FOR THE AMERICAN SEED INDUSTRY BY PROVIDING AN INCENTIVE FOR RESEARCH AND DEVELOPMENT

The American seed industry engages in research and development to produce novel seed varieties offering farmers higher yields and crops more resistant to adverse environmental conditions, disease, and pestilence. The need for new and better seed varieties is a continuous one. The prospect of ever-increasing yields prompts ongoing efforts, as does the need to respond continually to evolving disease and insect threats.[2]

Most agricultural crops are reproduced through self or cross pollination. Self pollinated crops include soybeans, wheat, and cotton; cross pollinated crops include corn and sorghum. Prior to enactment of the Plant Variety Protection Act in 1970, the American seed industry devoted the bulk of its resources to cross pollinated crops, which

[2] For example, new rust diseases—a particular threat to wheat crops—appear about every five years. The demand for new varieties resistant to those diseases therefore follows a similar pattern. *See* Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 8.

were easily hybridized. The reason was simple: Hybridized crops do not generate seeds that can be replanted or sold to grow another crop with the same characteristics. The developer of a successful hybrid therefore had inherent protection and a market for his product year after year, allowing him the opportunity to recoup the investment necessary to develop the hybrid in the first place. *See* H.R. Rep. No. 1115, 96th Cong., 2d Sess. 4 (1980).

The Plant Patent Act of 1930 reinforced this inherent protection, authorizing the developer of a new variety of an asexually reproduced plant to obtain a patent for the new variety. 35 U.S.C. § 161. The Plant Patent Act, however, was specifically limited to asexually reproduced plants. *See Diamond* v. *Chakrabarty*, 447 U.S. 303, 311-313 (1980).

The developer of a novel variety had no protection with respect to sexually reproduced plants. Once the new seed was sold, any farmer could grow a crop with it, generating many times the number of seeds originally purchased. *See* Pet. 3 (one bushel of soybean seeds produces 45 bushels of the same seeds). Because he did not incur the extensive research and development costs necessary to produce the novel variety, the farmer could sell the second-generation seed in competition with the developer at a much lower price. *See* Pet. 4 n.2 (Winterboers sold Asgrow's protected variety for eight dollars per bushel less than Asgrow).

The research and development costs can be daunting to an investor considering developing a new plant variety. As the House Agriculture Committee explained in 1980:

> The development of a new plant variety with a higher yield or a greater resistance to a specific disease is an arduous task. In some cases, thousands of crosses must be made documented and tested. The breeder may often spend years creating a breeding program to develop a new variety, with no guarantee of success. Once a new variety with commercial po-

> tential is developed, the developer must invest in advertising, distribution, production and all the other costs of operating a business, which will ultimately determine the profitability of the venture. [H.R. Rep. No. 1115, *supra*, at 4.]

Given these costs and risks, and the lack of any prospect of a return even if the new variety turned out to be successful, it is not surprising that private seed breeding efforts were largely limited to cross pollinated crops. Such research and development that did take place with respect to self pollinated crops was undertaken by university experiment stations and government entities, at taxpayer expense. *Ibid.*

The Plant Variety Protection Act was intended to change that, by "assuring the developers of novel varieties of sexually reproduced plants of exclusive rights to sell, reproduce, import, or export such varieties" for a set period of years. H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).[3] The Act was prompted by developments in Western Europe, where legal protection for plant varieties had resulted in "a great flowering of plant breeding, with the concomitant benefits of a more productive national agriculture and improved agricultural export." H.R. Rep. No. 1605, *supra*, at 1-2. In England, for example, the Plant Varieties and Seeds Act of 1964 led to "a great upsurge of plant breeding," causing "a once moribund seed industry [to] show[] signs of great new vitality." *Id.* at 2.

Congress sought to achieve the same benefits for American agriculture. The key objective was to "stimulate private plant breeding," so that public expenditures could be redirected to basic research. *Ibid.* That meant ensuring private developers an opportunity to secure a return on their extensive research and development costs,

[3] The original period was 17 years, amended to 18 years in 1980. 7 U.S.C. § 2483(b).

by protecting their rights in novel varieties they developed and providing a remedy for infringement of those rights.

The PVPA had its intended effect. When the House Agriculture Committee looked at the PVPA ten years after it was enacted, the Committee noted that "[p]rivate investment in varietal development research has increased dramatically since passage of the [PVPA]." H.R. Rep. No. 1115, *supra*, at 5. An analysis of the number of new plant varieties showed that three times more wheat and soybean and six times more cotton varieties were developed in the decade after enactment of the Act than in the decade before. *Id.* at 4. Another report showed the number of private soybean and wheat varieties for sale rising from three to 36 from 1970 to 1979. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 2. Yet another analysis found that "the PVPA has had a significant impact on private variety research," particularly with regard to soybeans, where there was a "dramatic increase in the number of private soybean breeding programs." R. Perrin, K. Kunnings, and L. Ihnen, *Some Effects of the U.S. Plant Variety Protection Act of 1970*, Economics Research Report No. 46, Department of Economics and Business, North Carolina State University, at 31, 38 (August, 1983). Other analyses also reflect the tangible benefits in research and productivity flowing from the PVPA. *See, e.g.*, A. Tallard, ed., *A Workshop Report: An Evaluation of the Issues, Challenges, and Opportunities Related to Plant Patenting*, 10-11 (Jan. 31-Feb. 3, 1989).

II. BROWN BAGGING HAS EVISCERATED THE INCENTIVE PROVIDED BY THE PVPA AND LED TO ABANDONMENT OF RESEARCH PROGRAMS

Brown bagging abuses, however, have undermined the statutory incentives for private investment in research and development programs. Throughout the seed industry, the growth of brown bagging abuses has led to the

curtailment or abandonment of the sort of development programs the PVPA was designed to encourage. A proper interpretation of the saved seed exemption would have helped end such abuses, and permitted the Act to serve its intended function. Instead, the construction adopted by the court below legitimizes such abuses and will inevitably result in dramatically reduced investment in development of new and better seed varieties.

If any farmer can sell up to one-half of a crop planted with a "protected" variety as seed, the supposedly "exclusive rights to sell, reproduce, import or export such varieties" guaranteed to the developer will become a fiction. H.R. Rep. No. 1605, *supra*, at 1. Without such rights, the developer will be unwilling to incur the significant expense and undertake the commercial risk to discover and develop the novel variety in the first place. For as USDA's Economic Research Service explained, "it is the ability of seed firms to make an adequate return on their research and development that encourages such firms to develop new and better varieties." Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry, supra*, at 7.

The extent and impact of brown bagging abuses is well documented. The Agrigenetics Company, for example, markets 151 seed varieties in 12 different species. It operates several research facilities in the United States, and invests some 17 million dollars in seed research annually. One of Agrigenetics' priorities was a research program involving stripper cotton. After an investment of several million dollars, the program culminated in the introduction of GSA 71, a variety so popular it accounted for some 16 percent of all cottonseed acreage planted in the United States. Agrigenetics was compelled to abandon the program and its further efforts to improve the quality of stripper cotton, however, because while 16 percent of all cottonseed acreage was planted with GSA 71, the company had only sold enough of its protected

seed to cover five percent of the acreage planted. Brown bagging accounted for the rest.[4]

An Agrigenetics program to develop new varieties of hard red winter wheat met a similar fate. The program was begun in 1981 and involved an investment of more than four million dollars over the next five to six years. Although Agrigenetics developed a dozen new varieties and considerable amounts of its seed were being planted by farmers throughout the Great Plains, it soon became apparent that farmer replant and brown bagging were so prevalent that it would not be profitable to continue the program. Agrigenetics discontinued not only sale of its wheat seed varieties but the entire research program as well.[5]

Other seed companies have had similar experiences with brown bagging. Agripro Biosciences Inc. ("Agripro"), for example, sells 28 varieties of wheat protected under the PVPA. It commits over six million dollars per year to new product development, and employs 111 employees in its new product research program. This research program came into existence only after passage of the PVPA, and depends upon the protections afforded by the Act.

In recent years, however, brown bagging has threatened the viability of the research program. For example, 30 percent of all acres planted with wheat in Kansas in 1989-1990 were planted with Agripro seed. Although this would suggest that the Agripro research program has been very successful, it turns out that authorized sellers sold only enough protected Agripro seed to plant five percent of the acres. Agripro thus secures a return on its research and development investment in this area 83 percent less than that intended by Congress when it passed the PVPA.[6]

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[4] *See* Brief for Amicus Curiae the Agrigenetics Company, *Asgrow Seed Company* v. *Winterboer, supra.*

[5] *Ibid.*

[6] *See* Brief of Agripro Biosciences Inc. as *Amicus Curiae* Urging Affirmance, *Asgrow Seed Company* v. *Winterboer, supra.*

This experience is quite common. Jacob Hartz Seed Co. Inc. ("Hartz"), for example, holds 18 certificates under the PVPA for soybean varieties. One of its varieties—"Hartz 5164"—is the most widely planted soybean variety in Arkansas. Hartz sells, however, no more than one-third of the seed used to grow that variety in Arkansas. Some of the shortfall is due to legitimate farmer replant, but the bulk of it is due to brown bagging abuses.[7]

Northrup King Company abandoned several significant seed research programs because of brown bagging. Northrup King sells approximately 185 varieties of seed and invests more than ten million dollars annually in research and development of new seed varieties. Through research facilities in Montana, Nebraska, Kansas, Minnesota, Arizona, Washington, and South Carolina, Northrup King developed several varieties of wheat, including a popular variety of hard red spring wheat known as Prodax. Prodax accounted for some 300,000 of the acres planted to hard red spring wheat in Montana in the early 1980s. Northrup King had sold, however, only enough of its protected seed to account for 22,000 acres of crop. Accordingly, Northrup King abandoned the research program, because the return it was entitled to under the PVPA was being eviscerated by brown bagging. Northrup King abandoned a stripper cottonseed program in Texas and a southern soybean program in South Carolina for the same reason.[8]

Brown bagging abuses have also plagued the research programs undertaken by Pioneer Hi-Bred International, Inc. The 1991 Doane U. S. Farm Soybean Seed Study found that the difference between Pioneer PVPA pro-

[7] *See Amicus Curiae* Brief of Jacob Hartz Seed Co. Inc. Urging Affirmance of the Decision Under Review, *Asgrow Seed Company* v. *Winterboer, supra.*

[8] *See* Brief for *Amicus Curiae* Northrup King Co., *Asgrow Seed Company* v. *Winterboer, supra.*

tected soybean units planted and units sold was 2.7 million, a loss of some 35 million dollars. Kansas agriculture statistics published in 1989 show Pioneer sales of its PVPA protected hard red winter wheat seed, variety 2157, accounted for only eight percent of the acreage planted to that variety, with brown bagging sales accounting for the other 92 percent. Not surprisingly, this led to a 1989 loss of 3.5 million dollars for Pioneer on its wheat sales, and in 1990 Pioneer discontinued its hard red winter wheat program.[9]

Delta and Pine Land Company holds twenty certificates under the PVPA for cottonseed and ten for soybeans. Over the five-year period ending in 1991, Delta and Pine invested 4.5 million dollars on cottonseed research and 3.6 million dollars on soybean research. Brown bagging abuses, however, have forced the company to abandon programs in each of these areas. Delta and Pine was compelled to close its cottonseed research facility in Lubbock, Texas—in the heart of the Texas High Plains cotton area—after the facility lost nearly one million dollars over a four-year period, primarily due to brown bagging. By the same token, the company was recently forced to close its soybean research facility in Wilson, North Carolina—eliminating one-half of its soybean research efforts—because of the adverse economic effect of brown bagging.[10]

Numerous other companies have reported curtailment of research programs. After initiating testing on soft winter wheat varieties in the mid-1980s, Golden Harvest Seeds, Inc., abandoned further varietal development plans. It determined that brown bagging would prevent it from recouping the necessary investment. Golden Harvest also decided not to add an additional soybean

[9] *See* Brief for Amicus Curiae Pioneer Hi-Bred International, Inc. *Asgrow Seed Company* v. *Winterboer, supra.*

[10] *See* Brief for Amicus Curiae Delta and Pine Land Company Urging Affirmance of the Judgment, *Asgrow Seed Company* v. *Winterboer, supra.*

research station in the western United States for the same reason.[11] By the same token, Stoneville Pedigreed Seed Company decided to forego its research program in Lubbock, Texas, because of brown bagging, and has affirmed that it will not allocate research expenditures to the Texas cottonseed market so long as brown bagging abuses continue to plague that market.[12] DeKalb Plant Genetics has curtailed its efforts to develop improved soybean varieties, the Anderson Clayton Company terminated a soybean program designed to develop new soybean varieties adapted to West Texas, and Cargill abandoned a cottonseed research program—all because of the inability to recoup investment due to brown bagging abuses.[13]

Indeed, the ironic fact is that the originator and certificate holder of a very successful new variety will probably sell a lesser percentage of the seed than the originator of a less successful variety. The more popular a particular variety is, the more likely that it will be a target of brown bagging abuses. *See* Office of Technology Assessment, *New Developments in Biotechnology: Patenting Life*, Special Report, OTA-BA-370, at 79 (GPO 1989).

III. THE ERRONEOUS CONSTRUCTION BY THE FEDERAL CIRCUIT SANCTIONS BROWN BAGGING ABUSES AND NULLIFIES THE PROTECTION AFFORDED BY THE PVPA

The foregoing are simply a few examples of the dramatic, concrete practical impact brown bagging abuses

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[11] *See* Brief for Amicus Curiae Golden Harvest Seeds, Inc. in Support of Plaintiff-Appellee, *Asgrow Seed Company* v. *Winterboer*, *supra*.

[12] *See* Brief for Amicus Curiae Stoneville Pedigreed Seed Company in Support of Appellee Urging Affirmance of Judgment of U.S. District Court, *Asgrow Seed Company* v. *Winterboer*, *supra*.

[13] *See* Brief *Amicus Curiae* of DeKalb Plant Genetics Urging Affirmance of the Judgment Under Review, *Asgrow Seed Company* v. *Winterboer*, *supra*.

have had on the sort of research and development programs Congress intended to promote through the PVPA. Quite simply, the statute does not work if extensive brown bagging is permitted, because brown bagging abuses take away the very financial incentive the Act confers on breeders. The decision below—by legitimizing brown bagging of up to 50 percent of any farmer's crop—will, if allowed to stand, render the PVPA a dead letter.

The question then becomes whether Congress enacted a statute that contained within it the seeds of its own destruction. The presumption, of course, is that Congress did not engage in a useless exercise when it enacted the statute. As the Court has recognized since its earliest days, "[o]ne portion of a statute should not be construed to annul or destroy what has been granted by another." *Peck* v. *Jenness*, 48 U.S. 612, 623 (1849). Instead the statute should be interpreted—if the language permits—in a manner consistent with its underlying purpose. *See Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

As explained in the petition for certiorari, a natural reading of the statutory language leads to the result that the saved seed exception limits a farmer's right to sell another's protected variety to the amount needed for next year's crop. Such a reading—unlike that adopted by the Federal Circuit—permits the Act to achieve its intended purpose, and is consistent with the "design of the statute as a whole."

The Fifth Circuit recognized the need to read the saved seed exemption in light of the purposes of the PVPA as

a whole in *Delta and Pine Land Company* v. *Peoples Gin Company*, 694 F.2d 1012, 1016 (5th Cir. 1983):

> The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost.

The statutory interpretation embraced by the Federal Circuit was advocated by neither party below, and precipitated five votes for in banc review and a pointed dissent from denial of in banc. As the dissenting judge noted, that interpretation renders an important congressional program a nullity. Pet. App. 30a. It also represents a crippling blow to the entire American seed industry. Research and development of new plant varieties will continue to be curtailed or abandoned altogether. To the extent the industry remains active in research, funds will be diverted to cross pollinated plants, or overseas, where the protection for developers is more secure. The experience prior to 1970 confirms that public funding of research and development is an inadequate substitute for private sector involvement, even indulging the unlikely assumption that public funding at any significant level would be available given current budget realities. The international competitiveness of American agriculture—a key component of American world trade—will suffer at a time when world-wide competition in the agricultural area is becoming increasingly intense.

Given the exclusive jurisdiction of the Federal Circuit, there is no prospect that the law will develop in a more favorable direction as future cases arise under the Act. The prospect of a legislative response to the Federal Circuit's erroneous interpretation of the Act is small comfort. First, that response is available in any case of statutory

construction, yet the Court has not ceased its practice of granting review in such cases. Second, corrective legislation is always an uncertain prospect, even in the most compelling cases, and certainly cannot be guaranteed in any reasonable time frame. Given the lead time involved in discovering, developing, and marketing a new variety, decisions on investment made now will have consequences for the state of American agriculture eight to twelve years in the future. *See* H.R. Rep. No. 1115, *supra*, at 4. The error below should be corrected now, and only this Court is in a position to accomplish that result.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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